United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

ORIGINAL 75-4285

United States Court of Appeals
For the Second Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

-v-

ROMO PAPER PRODUCTS CORP.,
Respondent.

ON APPLICATION BY THE NATIONAL LABOR RELATIONS BOARD FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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P/S

BRIEF FOR ROMO PAPER PRODUCTS CORP.

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BRIEF FOR ROMO PAPER PRODUCTS CORP.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union.

II. Did the Board's criteria for finding the Company in violation of the Act exceed the letter and spirit of the Act.

STATEMENT OF THE CASE

This case is before the Court on application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et. seq.), for enforcement of its order (J.A.35-37)[1] issued against Romo Paper Products Corp. (hereinafter "the Company") on September 23, 1975, and reported at 220 NLRB No. 81 which reversed the decision of the Administrative Law Judge. This Court has jurisdiction since the unfair labor practices charged are alleged to have occurred within this judicial circuit, where the Company is engaged in the manufacture, sale and distribution of writing pads and related products.

I. BACKGROUND

The Company, a New York corporation, is engaged in the manufacture, sale and distribution of writing pads and related products. The events herein involved the employees employed at the Company's plant at 36th Street, County of Queens, City of New York (J.A.4).

The Union[2] was first recognized as the exclusive bargaining representative for the Company's employees in 1961 (J.A.5, 16). During the period between 1961 and 1969, the Company and the Union negotiated and entered into three successive collective bargaining agreements (J.A.5, 16).

In 1969, the Company signed a boiler plate collective

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1. "J.A." references are to the Joint Appendix.

2. Folding Box, Corrugated Box & Display Workers Union, Local 381, International Brotherhood of Pulp, Sulphie & Paper Mill Workers, AFL-CIO.

bargaining agreement with the Union only after having suffered a strike and then signed without advice of counsel (J.A.363).

In 1972, the Company suffered a strike rather than capitulate to the Union's demands as the terms of the boiler plate contract demanded were so unacceptable, and so inapplicable to the Company's industry and so unreflective of the Company's operations that it appeared to the Company to be poor business sense to agree to such terms and hope to remain in a competitive position in the market place (J.A. 363). The Company was simultaneously challenging the Union's representative status.

Thereafter unfair labor practice charges were lodged against the Company and the Board ordered that the Company, upon request, bargain collectively with the Union. Romo Paper Products Corp., 208 NLRB 644 (1974), enf'd by default judgment of this Court in No. 75-4006 on March 31, 1975.

On or about February 1, 1974 the Union sent the Company a written proposal for specific increases in wages and benefits (J.A.6, 17-18, 125-126). The Company responded to this communication on or about March 1, 1974, and a bargaining meeting was thereafter scheduled for March 8, 1974 (J.A.140, 241). Because of a Jewish Holiday, Purim, the meeting of March 8th, was rescheduled for March 11, 1974 (J.A.241).

II. THE NEGOTIATIONS

Throughout the negotiations, the Company's principal spokesman was its attorney, Robert Jay Dinerstein, and the Union's principal spokesman was its Vice President, John Danetra (J.A.234-235, 242-243, 368). Dinerstein explained that it was his bargaining procedure to have the Union

explain its demands at the first bargaining session (J.A.201, 417, 420). At the March 11th meeting, there was discussion of the reduced work week and the Company's competitors. With respect to Pension and Insurance, the Company indicated a desire to consider self-insurance. There was some discussion relative to the Year End Vacation and the Company's work week. The Company also presented the Union with a proposal for a Management Rights Clause at this meeting (J.A.142-145, 200-202, 242-251).

During the interim between March 11th and April 1, 1974, there was to be a second negotiating session which was unaccountably canceled (J.A.430).

The second negotiating session took place on April 1, 1974. Dinerstein presented the Union with a lengthy list of Company proposals. Upon receipt of the Company's proposals, Danetra, after simply glancing through the proposals, stated that this wasn't negotiating and that they didn't think they should waste their time (J.A.147). After Dinerstein explained to the Union that the Company was not bargaining in bad faith simply by submitting demands (J.A.202) the Union representatives left the room to caucus (J.A.147, 202). At the session of April 1st, the Company changed its position in many respects and confirmed the substance of the negotiations in writing to the Union (G.C.—9; J.A.176-178). The Union at no time prior to the Administrative Trial took exception to the facts as set forth by the Company in the letter of April 10th.

On April 4, 1974 the Company and the Union met again and most of the meeting was devoted to a review of the balance of the Company's proposals. During this meeting, it became apparent that much of the expired contract and the Union's demands for hiring rates were inapplicable to

the Company as they relied upon the existence of classifications and classifications had never been negotiated or established. (J.A.166). The Union also demanded the Company's money offer but the Company declined contending that it was premature in view of the fact that there were so many open items the Company could not project the cost of the package. Upon the Union's insistence, however, the Company offered a $.10 package (J.A.166). The substance of the April 4th meeting was confirmed in the letter of April 10th (G.C.9; J.A.178-181) and again the Union at no time alleged that the letter wrongfully set forth the facts.

The next meeting was held on May 9, 1974. After advising the Union that they would retain the Union's insurance plan, the Company and the Union discussed the Pension Plan. The Company insisted the plan not only didn't benefit the Company's industry, but in fact didn't benefit the Company's employees. At this point, the Company agreed that old employees could retain either the old pension, if it would be more favorable to them, or the new pension (J.A.170). The discussion then covered the area of establishing job classifications. Job classifications were proposed and tentatively agreed upon subject to the Union checking out the details of the work performed by the employees (J.A.171). At this meeting the Company also proposed its "Current Benefits Proposal" (J.A.172) whereby current employees would not suffer any loss in certain benefits under the new contract. The company confirmed the substance of the May 9th meeting in writing (G.C.15; J.A.188-189) and again the Union did not challenge the facts as set forth in the letter.

The final negotiating session took place July 31, 1974. The Current Benefit Proposal was again discussed and

explained (J.A.353-354) but the majority of the meeting was dedicated to the consideration of an alternative to the Year End Vacation (J.A.287).

III. THE COMPANY'S PROPOSALS, COUNTER-PROPOSALS & CHANGES IN POSITION

The Company reduced its proposals to writing (G.C. 4, J.A.127-128; G.C.5, J.A.129-138) and further confirmed in writing the substance of the negotiating sessions of April 1st, 4th (G.C.9; J.A.176-183) and the session of May 9th (G.C.15; J.A.188-189). The facts, as set forth in those exhibits were unrebutted and unquestioned up to the time of the Administrative Trial and even upon the trial, few, if any, of those facts were contradicted. Some of the major issues which divided the parties follow:

A. Recognition

The Company proposed that the contract cover only positions currently in existence and that it not cover new jobs created (G.C.5; J.A.129-130). There was never a refusal to deal with the Union should these positions be created. There was some discussion as to what would constitute a new job, however, no agreement had been reached (J.A.172, 189, 225).

B. Union Security

The Company's proposal eliminated the "Union Shop" and the restriction prohibiting anyone, other than a Union member employed by the Company, from doing the work covered by the Agreement (J.A.129). This clause also imposed upon the Company the responsibility for soliciting and forwarding to the Union the Union Applications of new employees which, as a matter of law, is prohibited conduct.

C. Seniority

The Company agreed to the concept of seniority but in its proposal (G.C.5; J.A.131) qualified the application of seniority subject to the service and ability of the employees and further qualified it so as to be applicable only when practical with the Company having sole discretion as to when it would be practical. After hearing the Union's objections, the Company amended its proposal by withdrawing its demand that the Company have sole discretion (J.A.264-265). The Company also sought the elimination of the fifth paragraph (G.C.5; J.A.131) and the Union could not explain why the paragraph was even included (G.C.9; J.A.177, 208). There was considerable discussion about the rights of an employee called to return to work after lay-off with some movement by both sides and the Union essentially agreeing to the Company's proposals subject to some modification (J.A.308). The Company also withdrew its proposal as to the first paragraph and accepted the old language (G.C.9; J.A.177).

D. Work Preservation

There had been considerable discussion regarding the Company's right to sub-contract with the Company demanding the unrestricted right to sub-contract. The Union insisted that the clause, Article IV (J.A.116), permitted the continuation of the sub-contracting of work previously sub-contracted (J.A.261, 305) despite the fact that it had previously understood that the clause would have to be revised to effect such purpose (J.A. 149).

E. Business Slack

This clause, as it existed in the prior contracts, was founded on the existence of non-existent job classifications (J.A.117, 151). The Company proposed various amend-

ments (G.C.5; J.A.131) but the Union opposed any change in the existing contract (J.A.151, 314).

F. Management Rights

The Company submitted a Management Rights Clause (G.C.4; J.A.127-128) at the meeting of March 11, 1974 which it proposed be substituted for Article X. The proposed clause sought broad management control over areas which for the most part were previously uncovered and therefore subject to further bargaining. There was some negotiation relative to both the old clause and the proposed Clause and the Company did agree to modify its position (G.C.9; J.A.177); however, at no time during the negotiations was the Union prepared to negotiate with regard to this subject (J.A.319) and Danetra admits to never even having read the Company's proposal (J.A.319).

G. Current Benefits

In order to spur the Union on and give them a face saving mechanism (J.A.356), the Company proposed that any current employee would be entitled to retain any current benefits which might be more favorable (G.C.15; J.A. 189, 172) than negotiated in the new contract and defined which benefits this would apply to. The Union understood both the proposed clause and its intended purpose (J.A.172-173); however, no agreement was reached.

H. Wages

All of the Union's demands as to wages were premature as the demands related either to classification rates, including hiring rates, or to Schedule A rates. The Company's proposal as to hiring rates was ridiculous but was

obviously only a ploy to awaken the Union to the fact that the paragraph, hiring rates, did not really belong in the contract as there was no provision for job classifications and the Union conceded that the Company was correct (J.A.166) and the subject was thereafter deferred pending establishment of classifications.

The Company did make a wage offer on April 4th, but refused to make further enrichments in the offer until they knew what their costs would be (J.A.166). Throughout the negotiations, the Company insisted upon its right to resolve the tangential economic issues before making a revised wage proposal. The Union understood the Company's reluctance to make an offer on wages until the other items were costed out (J.A.286).

As respects Schedule A (J.A.124), it became obvious that it was no longer applicable. Danetra believed only three or four of the employees named thereon were still in the Company's employ (J.A.340) and the Company indicated that only one of the named employees was still in the Company's employ (J.A.209) so the subject was dropped as an independent item to be considered as part of the establishment of job classifications (J.A.209).

IV. THE ADMINISTRATIVE LAW JUDGES DECISION

Based upon the record as a whole and upon the observation of the witnesses, the Administrative Law Judge found that in view of the state of the negotiations, the issuance of the complaint was patently premature (J.A.8).

ARGUMENT

POINT I

SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS A FINDING THAT THE COMPANY WAS NOT GUILTY OF VIOLATING SECTIONS 8(a) 5 & (1) OF THE ACT

A. OBSERVATION—A VIRTUALLY INDISPENSIBLE ELEMENT IN EVALUATING BARGAINING ATTITUDE

It is respectfully submitted that in a bargaining case, and particularly the instant case, the attitude of the negotiators is as critical as the substance of the negotiations. A bargaining case cannot be equitably evaluated until one places themself in the atmosphere of the bargaining table. One must sense the tensions, feel the vibrations between the negotiators as they argue their positions back and forth and observe the negotiators testing each others strengths and weaknesses to truly understand what transpired at the bargaining table.

In our judicial process it is unfortunate that those who are usually called upon to ultimately rule on a parties negotiating behavior are not afforded the opportunity to hear the negotiator's voice levels, intonations and inflections, or to sense the implications arising therefrom, as the parties negotiate. All too often, particularly with experienced negotiators, it is just these characteristics which convey the subtleties and innuendos of the parties' respective positions. Furthermore, as every experienced

negotiator is well aware, it is all too often not what you say but what you don't say which carries the message, and even as respects that which is said, the manner in which it is said is often the critical measure. Thus, those who must decide a bargaining case are deprived of some of the most relevant evidence.

Our system does, however, provide some protection against the loss of this valuable criteria. The Administrative Law Judge, the trier of the facts, does have the opportunity to observe the witnesses as they testify and to draw from such observations an impression of the witnesses' true posture at the bargaining table. Hopefully the Administrative Law Judge can extract from such witnesses' attitude some insight into the otherwise indescribable atmosphere of the negotiations. In his decision, Judge Goerlich indicates that he was influenced by his observation of witnesses (J.A.4—footnote 1), as well as by the record as a whole in reaching his decision.

As the Board states in its decision and order (J.A.15) in the instant case ". . . we must determine whether, based on the preponderance of the evidence and the reasonable inferences drawn therefrom, Respondent has violated its statutory duty to bargain in good faith". In the context of the foregoing, who is better qualified than the Administrative Law Judge, who has observed the witnesses, to ascertain what inferences may be reasonably drawn from the preponderance of the evidence. To decide such an issue in the vacuum of the written word is to deprive the charged party of some of the most telling evidence.

The Board then states that the essential element in the bargaining process is the "serious intent" to reach a common ground and admits that the descriptive definitions themselves are incapable of being defined except in the

context of the particular facts of a particular case (J.A.15). Again one is faced with the inability to intelligently evaluate the parties "intent" from solely the transcription of words. A transcript of the hearing or the statement of a party rarely can reveal whether the words were spoken sarcasticly or facetiously, pleadingly or contemptuously, sincerely or disingenuously, or even in jest and it is submitted that such observations cannot be ignored when attempting to evaluate the parties intent.

Administrative Law Judge Goerlich having heard the facts and having had the opportunity to observe the witnesses, and in that context determine credibility and intent, had no apparent difficulty in concluding that the Company had not bargained in bad faith.

It is usually not until the negotiators have felt each other out and evaluated their respective strengths and weaknesses that the parties commence meaningful negotiations. Rather than being evidence of bad faith it is the usual trait of the seasoned negotiator.

B. THE BOARD ERRED IN ITS FINDINGS

The essence of the basis upon which the Board arrived at its finding is expressed by the Board itself:

> In sum, it is clear that the Respondents' proposals, if accepted, would have left the employees considerably worse off with Respondents proposed contract than they would have been without one. (J.A. 32)

While the propriety of the Board even taking such a factor into consideration is seriously questionable, the Board's obvious desire to impress its influence upon negotiations beyond its statutory duty has permeated its entire consideration of this case.

Had the Board had the opportunity to observe the witnesses it would have concluded, as did Administrative Law Judge Goerlich (J.A.8) that in view of the state of the negotiations, the issuance of the complaint was premature. While the Board takes the position that as respects some matters complained of "this kind of talk was not merely an opening-day bombast" (J.A.30) it is respectfully submitted that had the Board viewed the witnesses as they testified, it would have been forced to conclude that in fact, notwitstanding that five sessions had taken place, because of the Union's attitude and their apparent unfamiliarity with the bargaining process, negotiations were still in the preliminary stage.

The Board's statements of fact are so erroneous and biased so as to taint any findings made thereon. As opposed to seeking enforcement of the statute a reading of the "facts" would lead one to believe that the Board has lost sight of the fact that its purpose is to seek enforcement of the Act and not to act as the advocate of any party except in furtherance of the Board's statutory duty.

Frankly it appears that in the instant case the Board surrendered its duty to the drafters of the exceptions rather than as set forth in its decision and order (J.A. 14), having delegated its authority to a three member panel.

The Board in trying to fit the facts to its decision finds that ". . . Respondent, through the recognition proposal, was . . . demanding that the Union forfeit its status as representative for . . . new employees" (J.A. 34). This amounts to such a major mischaracterization of the Company's position so that, in and of itself, it should confirm to this Court that the Board had reached its conclusion first and then fashioned the facts to justify its decision. The Company's position in regards to

Recognition is clearly set forth in GC-5 (J.A. 129-130) and the Respondent believes that no reasonable interpretation of those proposals would justify the Board's finding.

The Board further states that in its view the minimum wage demand in and of itself would be sufficient to support findings of violation of Section 8(a)(5) (J.A.34). Curiously, the Board seeks to overlook a point that even the Union conceded, the hiring rates set forth in the Company's proposal were nothing more than a device intended to alert the Union to the fact that classifications had to be established. As Danetra stated, "We pointed out that the paragraph did not really belong in this contract because we did not have any job classifications, and after some discussion we agreed that job classifications would be put in" (J.A.166). A review of the relevant testimony will readily reveal that the Respondent was in fact the moving force in establishing the categories (J.A. 209, 224, 225, 229-30, 342).

The Board also states that in its view ". . . the Respondent's recognition . . . demands alone are sufficient to support findings of violation of Section 8(a)(5)". Frankly, it is difficult to comprehend on what basis the Board believes they can make a determination before the job in question exists. Certainly, the Board does not mean thereby to imply that it is incumbent upon the Respondent to negotiate regarding jobs which do not yet exist and which are totally undefined and unknown. Of course, once a job was created, should such newly created job properly fall within the scope of the Unit as defined by the Board, then the Company would be obligated to bargain with the Union with respect to such job.

It is most surprising that the Board finds any dispute as to the Company's position on this point in light of the fact

that the Company's proposal is little more than a restatement of Article X(x)(e) Operating Control (J.A. 118) as it appeared in the expired contract. The simple paraphrasing of the clause coupled with a desire to clarify what would be considered a new job hardly seems to be grounds to support a charge of bargaining in bad faith.

It is respectfully submitted that it would be absurd to accept the premise that it was the Board's intention to include undefined jobs to be created in the future within the bargaining unit. If that was the Board's intent then it is respectfully submitted that such an order is unenforcable as it is unreasonable, arbitrary and illogical to require an employer to bargain in a vacuum for employees he has not hired for jobs the Employer has not yet created.

The Board's findings are clearly not supported by the evidence unless the Board discounts Dinerstein's testimony, which is supported by Exhibits GC-4 (J.A.127), GC-5 (J.A.129-138), GC-9 (J.A.176-181), GC-10 (J.A.182-183), GC-15 (J.A.188-189) and credits Danetra's testimony, which is totally uncorroborated and which testimony is totally unworthy of belief as hereinafter demonstrated.

A review of the letters of April 10th (GC-9; J.A.176-181), April 12th (GC-10; J.A. 182-183) and May 23rd (GC-15; J.A. 188-189), clearly set forth the reasonableness and the flexibility demonstrated by the Company, and the Court's attention is respectfully called to the fact that at no time prior to the Administrative Trial did the Union respond to the Company as respects any of said Exhibits denying that they accurately set forth the facts.

C. DANETRA'S TESTIMONY IS UNWORTHY OF BELIEF

A reading of the record can clearly establish why Judge Goerlich found that he could not credit Danetra's testimony. In his affidavit (J.A. 139-173), Danetra curiously can recall his, the Union's, positions with great specificity yet Danetra repeatedly asserts that he cannot recall Dinerstein's comments or the discussions (J.A.151 (twice), 152, 153, 154, 155, 156, 157 (three times), 158, 159 (three times), 160 (twice), 163, 164, 266, 325, 354). The absurdity of Danetra's assertions becomes obvious when one notes that Danetra, who admits to being the Union's chief negotiator and who sets forth some of his credentials (J.A. 294-296), claims that "Dinerstein said that certain things could remain as they were ". . . however, I do not recall specifically what Dinerstein said could remain" (J.A.153), (also see Danetra's testimony on this point at J.A.317) and "I do not recall either the precise discussion or the substance of our discussion involving this proposal by the Company (J.A.154). Hardly typical behavior for a seasoned chief negotiator and particularly suspicious considering Danetra's later testimony that most of the time, in response to the Union's inquiries as to why the Company made its proposals or took its positions, Dinerstein would only respond that ". . . this is the Company's position and that was the end of most of the answers." Danetra even reiterates his newly recollected allegations that most of the time Dinerstein would make no explanation beyond that statement (J.A.260, 309).

How fortunate for Danetra that he was finally able to recollect that the Company repeatedly took such positions when in his affidavit he suffered from such memory lapses.

Needless to say that one should not be surprised that the suddenly recollected positions would serve to support the charges that the Company bargained in bad faith.

Danetra again demonstrates his amazing ability to suddenly recollect when, with respect to Article V—Reporting Information, he claims that Dinerstein replied ". . . this is the Company's prerogative, it is a lot of work and we just want it twice a year" (J.A. 262). Curiously in his affidavit engaging in any discussion on this point (J.A. 150).

Of course the entire affidavit (G.C.6; J.A. 139-173) cannot be credited when one considers that on September 3, 1974, only some thirty-four (34) days after the meeting of July 31, 1976, Danetra swore that:

> "Mr. Dinerstein's letter of May 23, 1974 also states that he will be in touch with us shortly to set up our next meeting. To my knowledge, no further communications have been received from Mr. Dinerstein concerning the scheduling of future meetings. As of this date, the Union has made no further requests for meeting having filed charges on May 20, 1974". (J.A. 173)

The only plausable explanation as to why Danetra would deliberately omit reference to the negotiating session of July 31, 1974 in his affidavit is because he was well aware that the negotiating at that session unequivocably attested to the fact that the Company was bargaining in good faith and that to make such an admission would in all probability convince the Board that no complaint should issue. The Court's attention is respectfully called to the fact that during Danetra's direct testimony (J.A. 283-293) and his cross-examination (J.A. 345-356) not only does he recall the meeting, the subjects negotiated and the alleged positions taken by the parties, he admits that there was

movement by management (J.A. 289, 356) and a review of the record will clearly establish that management was in fact bargaining in good faith. In regard to this point the Court is also urged to take notice of Exhibits G.C.16 (J.A.190), G.C.17 (J.A.191), G.C.18 (A.A.192-193), G.C.19 (J.A.194) and G.C.20 (J.A.195).

The issue of Danetra's credibility however goes far beyond the question of a convenient memory (J.A. 354). Danetra's testimony, both as found in his statement, (G.C.6; J.A.139-173) and his testimony (J.A.233-360), is replete with contradictions and misstatements of material facts.

A demonstration of Danetra's creative ability can be found with respect to his testimony regarding Article XXVI—Payment For Time Off. Apparently concerned that the Union did not have sufficient evidence to support a charge of bargaining in bad faith, in his September 3, 1974 statement he recalls "that no agreement was reached on either point" (J.A.160) notwithstanding the fact that in the letter of April 10, 1974 the Company clearly states that "Company's demand rejected by Union, *Company agreed to retain as is.*" (emphasis supplied) (J.A.179).

Continuing his repeated practice, Danetra again creates some testimony with respect to Article VIII—Temporary Transfers. Notwithstanding the clear and unequivocable language of the Company's proposal (J.A. 131), on direct examination Danetra undauntedly claims that "The Company was contending that a man should be paid his regular rate of pay if he does a higher rate of job" (J.A.266).

While the question of the Union's lack of preparedness will be handled elsewhere, is it not curious that Danetra claimed "that there were only eighteen to twenty em-

ployees" (J.A. 150) in support of his refusal to consider a management proposal only to later admit on cross-examination that "I did not know how many people are employed" (J.A.341).

During cross-examination, in regard to the First Paragraph of Article III Union Membership, there were questions posed relative to obtaining Union Membership applications (cards) for new employees. While Danetra testified that at the negotiations the Union's position was that "the Shop Steward gives the employees the card", Danetra reluctantly admitted that this contradicted his earlier testimony. Danetra further admitted that it was the Union's position that the Company could properly solicit the Union membership cards and denied that the Company ever brought out the fact that it would be improper for the Company to secure the cards (J.A. 297-298).

When Danetra was cross-examined with respect to the Company's position with regard to Article IX—New Jobs or Vacancy (J.A. 316-318) Danetra testified that Dinerstein didn't capitulate or give in in any respect with regard thereto. After reviewing his earlier testimony on this point (J.A. 153), Danetra insisted that contrary to such earlier testimony, there had been in fact no answer or change in position by the Company. A review of his direct testimony however will reveal that he admitted that the Company had in fact answered (J.A. 268).

Danetra once again demonstrates his amazing inability to recall with respect to Article XI—Direction of Employees. Danetra answered in the negative when asked "Did the Company in any way vary or modify this proposal?" (J.A. 272). Of course the response ignores the Company's position as set forth in the letter of April 10, 1974 (G.C.9; J.A. 177) wherein Dinerstein unequivocably

states that the "Company is willing to consider or compromise whereby employees are aware of and are to respect chain of command."

Danetra clearly sets forth the Union's bargaining attitude when in response to the question "Did there ever come a time when your attitude as such that even though you had no objection to the Company's proposal you would not agree—" Danetra admitted "I had an objection to every proposal the Company made." (J.A. 329-330). Immediately thereafter Danetra denies that despite the fact that he might not have an objection to a company proposal he would none-the-less refuse to agree. Danetra was then confronted with his earlier testimony (J.A. 163) and claimed that there was no contradiction in his testimony despite the blatant inconsistency.

With respect to the Union's reaction to the Company's presentation of demands on April 1, 1974, in his affidavit (J.A. 146-147) Danetra recalls that "*several* specific items" (emphasis supplied) caught his attention and that ". . . I said I didn't think we should waste our time. . . . Palmeri and I and Ingorda then went into a separate room. . ." clearly substantiating the conclusion that no negotiations took place. Contrast that with his recollection of the same incident as testified to (J.A. 254-259) wherein Danetra testifies that the only demand which caught his eye right off the bat was the wage proposal (J.A. 254) and then continues to describe negotiations which took place (J.A. 254-258) before the Union representatives left the negotiations (J.A. 259).

Danetra sets the standard for incredible testimony, however, when one reviews his statements relative to what became known as the Current Benefits Clause (J.A. 189, (first paragraph, 395). The Current Benefits Clause was a

proposal by management to the effect that any employee in the Company's employ prior to the execution date of the contract would be entitled to retain any current benefits which may be more favorable than the benefits in the new contract (J.A. 172-173, 189 first paragraph). It was understood that the Current Benefits Clause would apply to vacation, severance, medical, pension, insurance and holidays and would not apply to overtime (J.A. 172, 395).

Curiously the Current Benefit Clause appears to have been ignored during Danetra's direct examination (J.A. 233-293) despite the fact that Danetra testified extensively about the meeting of July 31, 1974 (J.A.284-293) and the further fac that by Danetra's own admission (J.A.172) he understood that it modified some of the same benefits with respect to which he testified the Company had not modified its proposal (J.A.280, 290).

Danetra's first testimony relative to the Current Benefits Clause was on cross-examination and followed his direction to read the proposal (G.C. 15; 189 (first paragraph). He was then questioned relative thereto as follows:

> Q. Did you nave any discussion with Mr. Dinerstein or anyone from the Company at any meeting concerning the effect of that contract offer?
>
> A. Yes, we did.
>
> Q. *At what meeting did you discuss it?*
>
> A. Can I look at my notes?
>
> Q. Certainly can.
>
> A. *On the May 9th.* (emphasis supplied) (J.A. 347) (see also J.A. 343)

Amazingly, after being asked to read the Clause again (J.A. 346) the following exchange took place:

Q. Did you reject that? (current Benefits Proposal)

A. No. I didn't reject that.

Q. Did you ever accept that?

A. *We never discussed it* (emphasis supplied)

Q. Didn't you in effect refuse to negotiate on it stating that you did not want to negotiate two contracts?

A. Before this letter (G.C.15) was sent I said that. (J.A. 347)

Danetra continues to testify that he didn't think it was clearly brought out that current employees would not be effected by those demands which the Union considered a backward step (J.A. 347-348) despite his statement that he read the letter of May 23rd (G.C. 15) and his sworn testimony that:

> "In this letter, Mr. Dinerstein states that management has also revised its position so that current employees would be entitled to retain our current benefits which may be more favorable than the benefits in the new contract. I understand this to be an explanation of Mr. Dinerstein's statements on May 21 concerning benefits for new employees (J.A. 172-173).

Danetra further testified that the Current Benefits Proposal was not discussed subsequent to the letter of May 23rd (J.A. 348) and when asked "And in the July 31st meeting did you discuss the Company's offer to treat the current employees different than the new employees?" Danetra responded, "No, sir." (J.A. 349)

Danetra's failure to testify truthfully is undisputedly established by the following exchange where he again denies *ever* discussing the Current Benefits Proposal at *any* negotiating session:

Judge Goerlich: Now, so that the record specifically shows it abundantly clear, *was that sentence* (current Benefits Proposal) *ever discussed in any negotiations?*

THE WITNESS [DANETRA]: No, sir; It was not.

Judge Goerlich: Very well, go ahead, please.

Q. Would you be kind enough again to refer to your affidavit which is G.C.6 on Page 36 (J.A. 172). And read, if you would, the bottom paragraph.

A. After the classification discussion, Mr. Dinerstein commented by saying that the counter-proposal previously made would apply only to include new employees, as far as their vacation, severance, medical, pension, insurance and holidays, but not on the overtime.

Q. *Now did you on July discuss further that statement, during the July meeting, the statement of Mr. Dinerstein that you just read?*

A. *Yes, we did.*

Q. Would you now tell us the sum and substance of that conversation?

A. Yes. I must say we did . . . (emphasis supplied) (J.A. 353-354).

Clearly the Board chose to ignore Judge Boerlich's findings as to credibility when the Board saw fit to reverse him. Despite a representation that the Union's attorney would testify on behalf of the Union (J.A.241), Danetra was the only Union witness to testify to the alleged bad faith bargaining. In light of the clearly incredible testimony of Danetra the Board's reversal of the Administrative Law Judge must be found to have been arbitrary, illogical and capricious. Danetra's testimony is so permeated with contradictions, convenient memory lapses and sudden self

serving recollections so as to be totally unworthy of belief and this Court must credit Dinerstein's testimony and sustain the findings of the Administrative Law Judge on these grounds alone.

D. THE UNION FAILED TO COME TO THE BARGAINING TABLE WITH THE REQUISITE SERIOUS INTENT

There would be an inherent flaw in any statute which would allow a Union to promulgate its demands in a vacuum and would then require the Employer to adhere to a standard of good-faith bargaining.

It is inconceivable that it was the intent of the statute that a Union which admits to ignorance of the Company's operations, and which Union formulates demands which blatantly reflect the Union's total unfamilarity with the Company and its industry, can be deemed to satisfy the statutory requirement of bargaining in good faith.

The Union admits that its demands were designed to bring the Romo employees up to par with other employees represented by Local 381. The issue here is whether this is good faith bargaining in as much as the Company insists that Local 381 did not represent anyone in Romo's industry. In his affidavit, Danetra acknowledges that this was the Company's position:

> "Mr. Dinerstein said that it is really a different industry . . . When told that it was really part of our industry and we could place these people to work at other jobs, he said, "We are not part of your industry and you do not have anybody who is in competition with us under contract." (J.A.170).

The fact that the Union did not represent anyone in the Company's industry is clearly established by the fact that at no time did the Union rebut the Company's argument by

naming any Employers the Union had under contract which the Union claimed were in the Company's industry. In fact, Danetra admits that, while he knew that the Company was in the industry of manufacturing pads, calendars and promotional items, the Union did not have any employers under contract whose primary source of business was manufacturing or selling pads (J.A. 294). This point is further evidenced by the fact that the Union had absolutely no idea as to who were the Respondent's competitors, as evidenced by the Union's repeated requests for the names of the competitors (J.A. 142, 170, 290, 295), and Danetra's statement that if Romo would tell the Union who Romo's competitors were, the Union would organize the competitors (J.A. 142).

It is indisputably clear from the testimony that the Union insisted upon its boiler plate contract virtually to the point of impasse despite its inapplicability to the Company's operations. The Company repeatedly argued that the boiler plate contract was inapplicable (J.A. 212) and explained it in terms of "trying to fit a square peg in a round hole" (J.A. 364, 367).

On at least one occasion during negotiations it came out that one "Saxon" was allegedly in a business similar to the Company and was alleged by the Union to be under contract to one of the Locals in the Union's International. Curiously, despite a direct inquiry by the Company, the Union refused to state that they checked with their International to find out what Saxon's contract was like and in fact refused to state that they made any attempt to find out about Saxon's contract (J.A. 367-368). At no time did the Union indicate that they had made any attempt to even find out anything about the Saxon contract let alone obtain a copy of Saxon's contract as it represented it would (J.A.170).

The Union's response to virtually every demand of the Company was to insist upon the boiler plate language (J.A.180, 221, 297, 298 (twice), 299 (twice), 302, 306, 307, 308, 310, 312, 314, 315, 316, 319, 320, 323, 324).

The boiler plate contract traditionally represents an attempt by a Union to bring about uniform wage or working standards in a particular area, trade, occupation or industry. In the instant case, the insistence upon the adoption of the boiler plate contract was patently improper as the proposed contract did not apply to the Company's industry (J.A.293, 297, 364) and the contract was clearly inapplicable to the Company's operation.

Even more critical, however, is the fact that the Union did not even bother to review the Contract to assess its applicability to the Company's operations.

The first paragraph of Article III Union Membership is clearly in violation of the statute (J.A. 298) in that it calls upon the Respondent to solicit Union membership for the Union.

Article VI—*LENGTH OF SERVICE* (J.A.116), Article IX—*NEW JOBS OR VACANCY* (J.A. 117), Article VII—*BUSINESS SLACK* (J.A.117), Article VIII—*TEMPORARY TRANSFER* (J.A.117), Article XII—*OPERATION OF MACHINES* (J.A. 118) all speak of job classifications, departments, and/or higher rated jobs. This is curious in light of the fact that no classifications, departments and/or rated jobs ever existed at the Respondent's Company. Wages were paid pursuant to Schedule A (J.A. 124) which established pay scales for each employee and established hiring rates. It would be interesting to see how the Union would intend to implement and/or enforce such clauses.

Article XXVI—*PAYMENT FOR TIME OFF*—Subsection (1) Year End Vacation (J.A. 121) requires the vacation to be given between Christmas Day and New Year's Day. The Union was totally unaware of the fact that the Company does not give vacations during the specified period but rather has traditionally scheduled such vacation during the Jewish High Holiday period (J.A. 144, 159, 246, 287).

Article XXXI—*HOURS OF WORK, OVERTIME, LUNCH AND SUPPER*—(J.A. 122)—first paragraph—Again the Union demonstrates its blatant failure to familiarize itself with the Company's operations. While the contract states that "the regular working schedule shall consist of eight (8) hours each day . . . to be worked Monday, Tuesday, Wednesday, Thursday and Friday", had the Union had made any effort they could have known that the actual work week was 8½ hours per day on Monday, Tuesday, Wednesday and Thursday and 6 hours on Friday with no overtime pay until the employee worked in excess of 8½ hours Monday, Tuesday, Wednesday, or Thursday. (J.A. 126A and 144).

Article XXXIV—*STANDARD FUNCTIONAL RATES AND INCREASES* (J.A. 122). This Article makes reference to Schedule A, classifications and a learners category. Again not only does the contract deal with classifications and categories which do not exist, the Union does not even know how many employees are employed by the Company (J.A. 341) or how many, if any, of the individuals whose names appear on Schedule A are still in the Company's employ (J.A. 209, 340).

The Union again demonstrated their total ignorance of the Company's operation in that the Union did not even know ". . . exactly what machines they had in the plant".

(J.A. 166, 171) or what classifications should be established (J.A. 171).

The union did not come to the bargaining table with the requisite "bona fide" intent to reach an agreement (J.A. 15, footnote (3)). In *Globe Cotton Mills v. N.L.R.B.* (103 F.2d 91, 94 (CA. 5, 1939) the Court held that there is a duty on both sides to bargain with an open and fair mind and a sincere purpose to find a basis of agreement. It is apparent from the Union's conduct that they failed to comply with such requirement. How can they bargain in good faith about wages when they have no conception of the jobs to be done.

The Court's attention is respectfully called to the fact that as early in the negotiations as March 20, 1974, the Union was forwarding copies of its correspondence to the Board (G.C.7; J.A.174). On April 1, 1974, the Union, responding to the presentation of the Company's demands, threatened to send a telegram to the Board (J.A. 147). Again on April 5, 1975, the Union admits that it sent a copy of its correspondence to the Board (G.C.8; J.A.175, 167). Such conduct not only establishes the Union as a rank amateur at the bargaining table but must cause one to question the Union's motives.

E. THE COMPANY'S BARGAINING PHILOSOPHY

In evaluating the Respondent's bargaining intent, the Court should not lose sight of the Company Negotiator's bargaining philosophy.

Obviously the negotiator's philosophy is shaped by the client's situation. In the instant case in 1969, the Company resisted signing a contract until it succumbed to a strike,

and then signed without advice of Counsel. In 1972, the Company again resisted but in that instance chose to suffer a strike rather than capitulate to what it felt was a boiler plate contract inapplicable to both the Company's industry and unreflective of the Company's operations. As further testified to by Mr. Dinerstein, his first two objectives were to isolate the cost factors and to evaluate management controls (J.A.363).

Dinerstein testified that he concluded that the Union was ". . . trying to fit a square peg in a round hole" by taking a boiler plate contract which, whether it was designed for one association or another, did not meet the Company's needs. Dinerstein believed that the contract should be reflective of the Company's needs as much as the Union's (J.A. 364-365). Every experienced negotiator promulgates demands in excess of those they expect to attain and Dinerstein admits that such was the case in this instance (J.A.365).

When asked about his bargaining policy, Dinerstein admits that it is his standard policy to bargain language first and economics second (J.A. 378) but goes on to say that in this case he did not adhere to his usual bargaining policy. He explains that in response to what he deemed to be a premature demand by the Union he made an economic offer. Dinerstein explained that he felt that too many tangential economic areas were unsettled for a realistic salary offer to be promulgated. This is consistent with the Company's original position as expressed in the letter of April 1, 1974 (G.C. 5; J.A. 137) and the position the Company maintained throughout the negotiations (J.A. 226, 379).

Dinerstein testified that subsequent to the April 4th meeting he became concerned that his bargaining overpowered the Union in view of the inexperience of the

negotiating team (J.A. 373-374) and explained that fearful of repurcussions resulting from the Union's inexperience and the Union's inability to cope with an experienced negotiator, after conferring with co-counsel, the Current Benefit Clause was formulated as a "face-saving" mechanism for the Union (J.A. 374-375).

Under cross-examination Dinerstein testified that he believed that the Union demonstrated "a total lack of knowledge of the operation of the employer . . ." (J.A. 387) which was the essence of one of the Company's major difficulties throughout the negotiations.

Dinerstein's statements as to the Company's intent, as substantiated by the record as a whole, should conclusively establish that Dinerstein was attempting to do nothing less than bargain in good faith to achieve a contract which was in his client's best interest.

F. THE COMPANY'S POSITION ON ECONOMICS

As previously set forth, despite Dinerstein's admitted bargaining strategy to negotiate language first and economics second (J.A. 378) because of the developing situation he changed his policy during the early stages of the negotiations.

Dinerstein testifies that on April 4, 1974 he made an economic offer in response to a premature demand by the Union ". . . to get them (the Union) . . . talking about other areas which, aside from language, were as much economic as wages, such as the number of holidays, ... overtime . . . . . jury duty, . . . death and (sic) family . . . which I contend are all economic matters." (J.A. 378) (also see J.A. 215, 226). This position was consistent with the Company's initial proposal (J.A.137) and Danetra

admits that the Company's reluctance to make a wage proposal was based on the fact "that they (the Company) had no idea what their costs would be." (J.A. 166)

The Union admitted that they never costed out their demands (J.A. 296, 379) despite the fact that they acknowledged that they should have some conception of what the Union's demands would cost the Company (J.A. 286)

Part of the Company's difficulty in costing out the demand's was the Union's failure to be frank and open. The following exchange between Danetra and Administrative Law Judge Goerlich is typical of the attitude the Union maintained at the bargaining table:

> JUDGE GOERLICH: Did you seek additional vacation from what you had before?
> THE WITNESS: We wanted to get a different schedule or a different way of computing the amounts of money received.
> JUDGE GOERLICH: It would cost the Company some money.
> THE WITNESS: Quite possibly. I have no way of knowing. (J.A. 247).

To fully understand the outright deceitfulness of Danetra's response one must compare GC-3A (J.A. 126(B)-126(E)) to Article XXX of GC-2 (d) (J.A. 121).

Danetra's answer to Judge Goerlich's first question regarding additional vacation was clearly evasive and misleading. Under the expired contract an employee with one year of service was only entitled to one weeks vacation whereas the Union's demand (J.A. 126(B)) would increase this to two weeks vacation. The Union's proposal (J.A. 126-C) further demands that an employee employed for two years but less than five years shall be entitled to three weeks vacation whereas under the expired contract an employee

had to be employed at least three years to be entitled to three weeks vacation.

Danetra then claims he has no way of knowing if the Union's vacation demand will be more costly to the Company. Aside from the obvious cost factors of the increases described in the preceeding paragraph, the most obvious cost factor was the introduction of percentages of gross earnings as the measure of vacation pay. A significant cost resulting therefrom would be the introduction of compensation in vacation pay for overtime worked. Of course the Union also demanded a minimum equivalent to the number of weeks vacation sought so, contrary to Danetra's statement (J.A. 163) "if a man took too much time off or only worked part of the year due to lay-off or sickness", the employee would only fail to qualify for the minimum vacation if absent for 17 weeks or more except if the absent employee was on workman's compensation or disability they would still be entitled to the minimum.

Some of the other incidental cost factors arising from the Union's vacation demand, which Danetra claims he had no way of knowing, include incorrect percentages for the purpose stated (J.A. 290), introduction of a 50% bonus for work during vacation, institution of a vacation benefit of one week for employees after six months of employment, elimination of the prohibition against the accumulation of vacation, a demand for full vacation for a terminating employee as opposed to the previous pro-rate clause coupled with the elimination of the clause which provided that vacation pay would be forfeited if an employee quits without giving three working days notice.

The Union's failure to be open and above-board is further demonstrated by their attitude with respect to their demand for a thirty five hour week. The Union, in its

demands, does not state that the Union is seeking the same pay for the thirty-five hour week as its employees had received for the fourty hour week. Danetra, however, after evading Judge Goerlich's question (J.A. 248), admitted under cross examination that it was the Union's intention that the workers receive the same pay for thirty-five hours as they had previously received for fourty hours, plus presumably any wage increases negotiated, and further admits that after five bargaining sessions, and over a period of almost six months, the Union never advised the Company that this was included in the Union's demand.

It is again respectfully submitted that the Union's attitude, as demonstrated by the foregoing examples, permeated the negotiations and precluded the Company from realistically calculating its costs and promulgating an offer. While the Respondent maintains that, contrary to the apparent finding of the Board (J.A. 24), even a superficial review of the record will establish that Dinerstein used the phrases "tangential demands", "economic demands" and even "language" interchangably and that Dinerstein was simply trying to cost out the "economic demands" before making a money offer, the order in which clauses are negotiated is not material to the issue of good faith.

POINT II

THE BOARD'S CRITERIA EXCEED THE LETTER AND SPIRIT OF THE ACT

A. THE CRITERIA

The statutory measure of the requisite bargaining attitude is one of "good faith". As the Board observes, this is an imprecise standard (J.A. 15). Through the years the Board and the Courts have attempted to define the scope of "good faith". Ultimately each case must be determined on its own merits for as the Board states, in citing *NLRB vs. American National Insurance Company*, 343 U.S. 395, 410 (1952) (J.A. 15), "Of course, such descriptive definitions only have meaning when applied to "the particular facts of a particular case". Obviously then to bargain in bad faith one must have less than a "serious" or "bona fide" intent to reach a common ground or reach agreement.

On what basis can an equitable determination be made. In the vast majority of instances the material elements are intangible, subjective and undefinable. As previously argued, the inability to observe the negotiations further deprives the ultimate judge of a substantial portion of the facts.

The intent of the statute has been distorted to the point where the Board has lost sight of its purpose and all too often now sees itself as labor's advocate.

As a basis for its decision in this case the Board essentially relies upon four criteria:

> —where the employer during renegotiations manifests an unwillingness to offer anything other than a "radical departure" from the previous contract (J.A. 16),

—where the employer insists that economic terms not be discussed until accord is reached on all other matters (J.A. 16).

—where the employer insists on retaining sole discretion in determining working conditions (J.A. 16).

—where the employer has insisted upon demands which do not have the slightest chance of acceptance by a self-respecting Union (J.A. 32).

1) *Radical Departure*—On what objective basis can it be alleged that the statute intended to restrict management to only "unradical" departures from the expiring contract on the renegotiation thereof? Where is it stated in the statute, specifically or impliedly, that once a contract is agreed to, thereafter, on its renewal, management can not seek radical changes therein.

Has anyone considered the realities of such a rule? As a practical matter the Unions are not hindered by any such restriction on their demands. Anyone who has sat across the bargaining table with any regularity has come to expect the Union to demand innumerable radical changes.

Let us for a moment consider the instant case in this regard, although in this case the number of Union demands is relatively modest.

a) reduce work week from 40 hours to 35 hours with no loss in pay (a 12½% increase in pay)

b) an increase in pension contributions of $4 per week the first year (a 66.6% increase)

c) a further increase in pension contributions of $2 per week for the balance of the contract (an additional 33% increase over the expired contract, equalling, when combined with the first pension increase, just a little less than a 100% increase in pension contributions over the term of the contract)

d) an increase in insurance contributions of $4 per week (a 66.6% increase)

e) establishing 90 days, instead of the previous one year, as the qualification basis for year end vacation

f) an increase of 3 holidays, bringing the total to 14 holidays (an increase of over 27%)

g) overtime to begin after 7 hours in one day and after 35 hours in one week (about an 8% increase assuming the Company must maintain at least an eight (8) hour production day)

h) an increase of $1.00 per hour in Schedule A rates (over a 23% increase for the highest paid Schedule A worker, Quinton Lopez (J.A. 124) and over a 42% increase for the lowest paid Schedule A worker, Margarita Gamayo (J.A. 124)

i) vacation (costs unprojectable)

1) 2 weeks after one year (increase of one week—100% increase)

2) 3 weeks after two years (previously 3 weeks only after 3 years)

3) guaranteed 1 week after 6 months (brand new)

4) 50% bonus if employee works during vacation (brand new)

5) guaranteed minimum vacations

6) vacation to be calculated on percentage of gross pay which would reflect overtime (brand new)

7) percentages are not in proportion (2 weeks do not equal 4% of the work year—should be about 3.8% the difference is more significant on longer vacations)

8) elimination of clause whereby Employee forfeits vacation pay if, upon resigning, employee fails to give adequate notice.

9) employees, upon termination, to be entitled to full vacation benefits (previous contract provided for pro-rata benefits)

Is there any question but that the Union's demands, as herein enumerated, constituted a "radical departure" from the expired contract or is the restriction against "radical departure" only applicable to management?

Assuming arguendo that "radical departure" is found to be an equitable measure of "bargaining faith", is there no allowance for management's position?

In the instant case the Company, under duress of a strike, and without advise of counsel, signed the contract in 1969. In 1972 the Company withstood the strike, and continues to suffer the strike (J.A. 363) rather than capitulate to a boiler plate contract which tried to force a square peg in a round hole (J.A. 364).

Is an employer married to a prohibitive contract forever simply because, lacking the advise of knowledgeable counsel, he signed an agreement? Or, if management signed an unfavorable agreement, is management doomed to a slow death while it rectifies its position through "unradical departures" over the next 6, 12 or 15 years.

Nowhere in the statute does it so much as imply that the contract is to be a building block for labor, and on each renewal labor can seek to build it bigger and stronger while management must reconcile itself to plastering the cracks. If labor has the right to seek major renovations upon renewal management can not be delegated to minor alterations.

Furthermore there appears to be no statutory requirement that the expired contract play any role in the negotiation of a new contract.

2) *Bargaining Sequence*—Without reiterating at length the arguments put forth in support of the preceeding point, again one is forced to ask upon what statute does the Board or the Court rely in dictating that an employer shall be found to be bargaining in bad faith if it insists upon resolving one area of demands (language) before another (economics).

Again we must rely on the "seasoned negotiator" to support Respondent's position. Any negotiator who has spent time at the bargaining table knows that it is much more difficult to resolve language after the economics are settled. While many theories have been expounded trying to explain this phenomenon whether it can be objectively explained and/or proven or not, any experienced negotiator knows it is the way things are.

The only statutory requisites are "good faith" and the intent to reach an agreement. So long as a party is negotiating in good faith on the mandatory subjects of bargaining the statute has been complied with and there is no statutory authority as to which mandatory subject of bargaining, if any, must be given any priority.

3) *Employers Determination of Sole Discretion*, and

4) *No Chance Of Acceptance By A Self Respecting Union*—These criteria have been taken together because of the rather obvious inconsistent criteria they reflect.

In the first instance let us consider the matter of self-respect. If the issue of self-respect, and the denigration of a party (J.A. 32 (footnote—23), were applied even-handedly as a criteria in evaluating a parties good faith bargaining it is virtually a priori that every set of Union demands would constitute bad faith bargaining.

Virtually every set of Union demands, particularly upon

renewals, cuts a little deeper into managements' well established right to run its own business.

What greater attack can be made on a company's self-respect than to deprive the Company of the right to control its own destiny, however, regardless of what titles or article numbers they appear under, there are few if any contracts which do not restrict this right.

Again referring to the expired contract in the instant case, would any "self-respecting" company accept the following restrictions upon its control:

1—*Union Membership—Article III* (J.A. 116)

a) Management must discharge an employee, no matter how valuable, if after 30 days the employee doesn't join the Union (Article III—Recognition; J.A. 116).

b) No matter what the circumstances, and no matter how badly production may be backed up, even the owner of the plant is not allowed to do work covered by the contract.

2—*Work Preservation—Article IV* (J.A. 116)

Management can not subcontract work even if to do so would result in a more profitable and/or efficient operation and would not cause any lay-offs.

3—*Temporary Transfer—Article VIII* (J.A. 117)

If the Company, for reasons of economics or efficiency, must transfer an employee to a lower paying job the employee, even though doing lower paid work, must receive the employees usual higher rate of pay.

4—*New Jobs or Vacancy—Article IX* (J.A. 117)

The Company can not determine who to promote based upon the Company's evaluation of potential and/or ability.

5—*Direction of Employees—Article XI* (J.A. 118)

The owner of the Company is not allowed to direct the work force without going through an intermediary.

6—*Operation of Machines—Article XII* (J.A. 118)

Again, even the owner of the Company is not allowed to operate his own machines unless he pays an employee to be present.

7—*Severance Pay—Article XIII* (J.A. 118)

Even if the Company goes bankrupt the Company has to provide severance pay.

8—*Check-Off—Article XVIII* (J.A. 119)

The Company must collect the Union dues for the Union.

9—*Union Activity—Article XX* (J.A. 120)

Regardless of how valuable and indespensible an employee might be to the Company's operation, upon request, such employee must be given a leave of absence for up to two years.

10—*Leave of Absence—Article XXI* (J.A. 120)

The employer must grant a leave of absence to every employee requesting a leave of absence for reasonable cause. There is no time limit and the employee has the right to have the leave renewed.

11—*Payment For Time Off—Article XXVI—Year End Vacation* (J.A. 121)

Not only does the Company give the usual vacation it is required to give a second vacation during the winter holidays.

12—*Payment for Time Off—Article XXVI—Reporting Time* (J.A. 121)

If an employee reports to work he must be paid

for at least 4 hours even if there is no work.

13—*Jury Service—Article XXVII*

There is absolutely no limit on how long the Company must pay an employee serving jury duty.

14—In addition, an employee employed over 5 years is entitled to a minimum of 40 days off with pay per year under the expired contract.

These issues are not raised in protest over the benefits and/or protection the Union has been able to negotiate for its members, but rather to illustrate that many of the Union's demands must be found to be demeaning to the Company. None-the-less it would be inconceivable that a Union would be cited for bargaining in bad faith by making any of those demands.

It is difficult to reconcile that the Board cited the Supreme Court's ruling in *NLRB v. American National Insurance Co.*,[3] in support of its position that the company's demand for sole discretion in certain critical areas, (J.A. 16) with the fact that the case specifically finds that a management demand for a broad management rights clause is not evidence of bad faith and the court cautioned the Board that such issues are "for determination across the bargaining table, not by the Board."

Demanding the right to exercise complete control over the assignment of work and demanding an absolute right to sub-contract bargaining unit work[4] have likewise been held not to be bad faith bargaining. The Board itself held that management has the right to demand a limitation of arbitration to only those grievances as it may be specifically provided for in the agreement.[5]

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3. NLRB v. American National Insurance Company, 343 U.S. 395 (1952), 30 LRRM 2147.

4. NLRB v. Lewin-Mathes Co., CA 7 (1960), 47 LRRM 2288.

5. Proctor & Gamble Mfg. Co., NLRB (1966), 62 LRRM 1617.

B. THE RAMIFICATIONS OF THE CRITERIA

An analysis of the cumulative effect of the foregoing criteria must lead one to find that if those criteria are in fact controlling management has essentially been deprived of its statutory right to negotiate the terms and conditions of its employees employment.

When one considers that any proposed reduction of benefits and/or any demand for the right to exercise more discretion by management would have to be deemed offensive and denigrating to any "self-respecting union", whatever that is, one must conclude that the only option open to management at negotiations, pursuant to these criteria, is to succumb to as few of the Unions demands as they can.

When one combines that criteria with the prohibition against management proposing any "radical departure" from an expired contract, the only conclusion to be drawn is that the powers that be have deemed that what the Union can not obtain or retain at the bargaining table they can obtain through unfair labor practice charges.

Not satisfied with restricting what management can bargain about it is then dictated that management will be negotiating in bad faith if the priority management gives the mandatory subjects of bargaining is inconvenient or even unfavorable to the Union.

It is respectfully submitted that the sum total of the ramifications of these criteria, particularly in cases involving the negotiation of renewal contracts, is that the Board is attempting to do by indirection that which it has been prohibited from doing directly, namely injecting itself into the substantive terms of the negotiations. In *NLRB v. American National Ins. Co.*, (*supra*) the Court held that

since an employer is not required to make concessions, the Board may not "either directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of . . . agreements.'

The Courts have repeatedly emphasized that the bargaining provisions of the Act restrict the Board s function to encouraging the parties to reach agreement and that the parties must otherwise be left to their own devices as long as they bargain fairly and with a desire to reach agreement. An objective analysis of the Board's action in the instant case clearly reveals that the Board has exceeded its statutory function. In virtually dictating to the Company that, based upon one or another of the stated criteria, management can not seek a major revision in the expired contract, the Board has effectively precluded the Company from excercising its statutory right to collectively bargain with respect to those mandatory subjects covered in the expiring agreement. The letter, as well as the spirit, of the statute clearly does not restrict management's right to renegotiate each and every term of the expired agreement and by attempting to restrict this right the Board has surrendered its statutory function and adopted the posture of the Union's advocate.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court make and enter its decree dismissing this proceeding.

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May, 1976

GUTTERMAN & POLLACK DINERSTEIN NLRB v. Romo

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 1 day of June 197 6 deponent served the within Brief upon:

John S. Irving, General Counsel Att: Aileen A. Armstrong, Esq. Jesse I. Etelson, Esq. National Labor Relations Board, Washington, D.C. 20570

attorney(s) for

Petitioner

in this action, at

National Labor Relations Board
Washington , D.C. 20570

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 1
day of June, 197 6

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977